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United States District Court,
E.D. Louisiana.

PARISH OF JEFFERSON
v.
COX COMMUNICATIONS LOUISIANA, LLC

No. Civ.A. 02-3344.

July 3, 2003.

ORDER AND REASONS

VANCE, J.

*1 Defendant, Cox Communications Louisiana LLC, moves the Court for partial dismissal of plaintiff's claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court GRANTS defendant's partial motion to dismiss.

I. BACKGROUND

On March 27, 1990, the **Parish of Jefferson** and Cox Communications LLC, the successor to Cox Cable Jefferson Parish, Inc., entered into a Cable Television Franchise. [FN1] The Franchise Agreement provides that the "intent of this Agreement is to ... set forth the standards, terms, and conditions for the continued operation of a cable television system by The Company [Cox]...." [FN2] Under the terms of the Agreement, Cox has the right to use the **Parish's** streets and facilities to construct and maintain its "System" from March 27, 1990 until October 31, 2006. [FN3] In exchange, Cox must pay to the **Parish** annual franchise fees, as follows:

FN1. See Pl.'s Ex. A, attached to Pl.'s Pet.

FN2. See *id.* at preamble.

FN3. See *id.* § 2.2.01.

[F]or the use and occupation of the Streets and other facilities of the **Parish** and the operation of the Cable Communications System a total amount

equal to five (5%) percent of the Company's Gross Revenues for such annual period. [FN4]

FN4. See *id.* § 7.1.01.

In the Agreement, the parties acknowledge that "the Company is paying the **Parish** the maximum franchise fee percentage (five (5%) percent) allowed by the Cable Act." [FN5] The Agreement also includes a clause incorporating future legal requirements:

FN5. See *id.* § 7.1.05.

The provisions of this Agreement shall be construed to conform to all present and future requirements of the FCC, all acts of Congress of the United States, and all acts and requirements of the State of Louisiana. In the event future modifications to current law authorize the **Parish** to regulate rates, services or other activities of The Company, this Agreement shall be deemed automatically amended to provide for said regulation by The **Parish** to the fullest extent permissible. [FN6]

FN6. *Id.* § 12.23.

Several definitions in the Agreement are relevant. "Gross Revenue" is defined as "all receipts ... derived, directly or indirectly, by The Company from or in connection with the operation of the System, including, without limitation: the distribution of any Service over the System; the provision of any Service Related Activity in connection with the operation of the System...." [FN7] The list of sources of gross revenue in this section covers television cable service, such as basic cable service monthly fees, installation and reconnection fees, equipment rentals, and remote control rentals. [FN8] "Service" is defined as "any cable or cable related service, including, without limitation, the sale of cable programming, the publication and sale of cable programming guides, and the sale or rental of cable remote controls, ... which is offered or provided to any Subscriber in conjunction with or distributed over the System." [FN9] "System" means the "Cable Communications System," which in turn is defined as

FN7. *Id.* § 1.1(O).

FN8. *See id.*

FN9. *Id.* § 1.1(AA).

any facility operating by means of coaxial cable, optic fiber, or other transmission lines or otherwise, the primary function of which is to receive, through any means, ... and to distribute the signals of one or more broadcast television or radio stations and of other sources of video, audio, voice or data signals. Said facility may also be one which distributes to, from, or among Subscribers or other Persons such other video, audio, voice, or data signals as may originate within the Cable Service Area or elsewhere. [FN10]

FN10. *Id.* § 1.1(E).

*2 "Cable service" is not defined, but the Agreement provides that "any word or term defined in the Cable Act but not defined below shall have the meaning set forth in Section 602 of the Cable Act." [FN11] Section 602 of the Cable Act, as amended, defines "cable service" as

FN11. *Id.* § 1.1 at preamble.

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6). "Telecommunications service" is not included in the definition of "cable service" under section 602, but it is defined elsewhere in the Cable Act. *See* 47 U.S.C. §§ 3(46) & (43).

On October 11, 2002, the **Parish** sued **Cox** in state court for breach of contract based on allegations that **Cox** had refused to pay, and was underpaying, various franchise fees. On November 6, 2002, **Cox** removed to federal court. On June 20, 2003, this Court denied plaintiff's motion to remand. [FN12] In its petition, the **Parish** alleges that **Cox** underpaid franchise fees on revenue collected for video, audio, voice and data services." [FN13] The **Parish** asserts that **Cox** expressly agreed to pay the **Parish** five percent of its revenue for video, audio, voice and data signals distributed over its System, even though **Cox** did not provide all of those services at the time that

the Contract was executed. [FN14] The **Parish** alleges that during the course of the contract, **Cox** began offering data services and, for a time, paid five percent of its revenues on data services to the **Parish**. [FN15] Then in April of 2002, **Cox** allegedly notified the **Parish** that it would stop paying the five percent fee for data services. [FN16] As to voice services, the **Parish** asserts that **Cox** began offering voice services in 1998 and that despite repeated demands, **Cox** refused to pay the **Parish** five percent of its revenue for voice services. [FN17] The **Parish** also states that **Cox** has underpaid franchise fees for video and audio services. [FN18]

FN12. Rec. Doc. No. 49.

FN13. Pl.'s Pet. ¶ 15.

FN14. *See id.* ¶ 16.

FN15. *See id.* ¶ 17.

FN16. *See id.* ¶ 18.

FN17. *See id.* ¶¶ 20-21.

FN18. *See id.* ¶ 23.

In its partial motion to dismiss for failure to state a claim, **Cox** admits that it currently provides cable television service, cable modem service, and telecommunications service to its customers in the **Parish**. [FN19] Nevertheless, **Cox** argues that plaintiff's claims for payment of franchise fees on cable modem service (data service) and telecommunications service (voice service) must be dismissed. First, defendant argues that while the Agreement requires payment of franchise fees on cable service, it does not call for the payment of franchise fees on cable modem or telecommunications services. In the alternative, defendant argues that even if the Agreement can be read to contemplate coverage of these services, federal law (specifically, the Cable Act), which is expressly incorporated into the Agreement, preempts contrary provisions of the Agreement and precludes plaintiff from exacting franchise fees from defendant for these services.

FN19. See Def.'s Mot. to Dismiss at 2 n. 1 & 3.

II. DISCUSSION

A. Legal Standard

*3 In a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept all well-pleaded facts as true and view the facts in the light most favorable to the plaintiff. See Baker v. Putnal, 75 F.3d 190, 196 (5th Cir.1996); American Waste & Pollution Control Co. v. Browning-Ferris, Inc., 949 F.2d 1384, 1386 (5th Cir.1991). The Court must resolve doubts as to the sufficiency of the claim in plaintiff's favor. Vulcan Materials Company v. City of Tehuacana, 238 F.3d 382, 387 (5th Cir.2001). Dismissal is warranted if it appears certain that the plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief. *Id.*; Piotrowski v. City of Houston, 51 F.3d 512, 514 (5th Cir.1995) (quoting Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir.1994)).

The Agreement was attached to plaintiff's petition and incorporated therein. Thus, the Court need not treat defendant's motion to dismiss as a motion for summary judgment. See Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1017 (5th Cir.1996) (holding that in deciding motion to dismiss, courts may consider documents attached to complaint or incorporated therein).

B. The 1990 Franchise Agreement

Under the Agreement, Cox is required to pay plaintiff franchise fees at five percent of gross revenues for its use of plaintiff's rights of way. The parties dispute whether the Agreement requires Cox to pay these fees for cable modem and telecommunications service. The Court must examine several definitions in the Agreement to resolve this dispute.

"Gross Revenue" is defined as "all receipts ... derived, directly or indirectly, by The Company from or in connection with the operation of the System, including, without limitation: the distribution of any Service over the System; the provision of any Service Related Activity in connection with the operation of the System...." [FN20] "System" means the "Cable Communications System," which in turn is defined as

FN20. Pl.'s Ex. A § 1.1(O), attached to Pl.'s Pet.

any facility operating by means of coaxial cable, optic fiber, or other transmission lines or otherwise, the primary function of which is to receive, through any means, ... and to distribute the signals of one or more broadcast television or radio stations and of other sources of video, audio, voice or data signals. Said facility may also be one which distributes to, from, or among Subscribers or other Persons such other video, audio, voice, or data signals as may originate within the Cable Service Area or elsewhere. [FN21]

FN21. *Id.* § 1.1(E) (emphasis added).

The Court finds that the Agreement contemplates franchise fees on cable modem (data) and telecommunications (voice) services. First, "gross revenue" includes "all receipts" derived from "operation of the System" and it includes, but is not limited to, receipts from "cable or cable related service." Second, the definition of the "System" expressly includes operation of the facility to distribute data and voice services. Although defendant argues that the term "service," which is defined as "cable or cable related service," does not include cable modem or telecommunications services because section 522(6) of the Cable Act does not include voice service and because the FCC has recently interpreted the Cable Act not to include cable modem service, that argument misses the mark. The Agreement includes "all receipts" from operation of the System, and does not limit revenues to cable and cable related service.

C. Preemption Under the Cable Act

*4 Defendant argues in the alternative that, even if the Agreement does contemplate franchise fees for cable modem and telecommunications services, the Cable Act preempts the Agreement and prohibits plaintiff from exacting such fees. The Court agrees.

Preemption of a common law cause of action by federal law is a question of law. See Frank v. Delta Airlines, Inc., 314 F.3d 195, 197 (5th Cir.2001). "Federal law will override state law under the Supremacy Clause when (1) Congress expressly preempts state law; (2) Congressional intent to preempt may be inferred from the existence of a pervasive federal regulatory scheme; or (3) state law

conflicts with federal law or its purposes." *Id.* In a subsection entitled "Preemption," the Cable Act provides that "any provision of any franchise granted by such [franchising] authority, which is inconsistent with [the Cable Act] shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). Thus, this case involves express preemption of state law by Congress. Further, the Agreement itself incorporates present and future requirements of federal law, including FCC rulings, and of state law:

The provisions of this Agreement shall be construed to conform to all present and future requirements of the FCC, all acts of Congress of the United States, and all acts and requirements of the State of Louisiana. In the event future modifications to current law authorize The Parish to regulate rates, services or other activities of [Cox], this Agreement shall be deemed automatically amended to provide for said regulations by The Parish to the fullest extent permissible. [FN22]

[FN22]. Pl.'s Ex. A § 12.23, attached to Pl.'s Pet.

Louisiana law prevents the Parish from imposing franchise fees prohibited under federal law:

No police jury, municipality, or other local governing authority empowered to grant cable television franchises shall charge any franchise fee of any kind in excess of that authorized by federal law.

LA. REV. STAT. ANN. 33:4461. It is clear that under federal law, state law, and the Agreement itself, the Cable Act preempts state law in this case in the event of a conflict. The question, then, is whether the Cable Act prevents the Parish from imposing franchise fees on Cox's telecommunications and cable modem services.

Before its amendment in 1996, the Cable Communications Policy Act required cable television operators to procure franchises from local municipalities and permitted local municipalities to collect as franchise fees up to five percent of the cable operators' annual gross revenues derived "from the operation of the cable system." 47 U.S.C. § § 541, 542(b). In 1996, Congress amended the franchise fee provision to limit franchise fees to up to five percent of the cable operators' annual gross revenues derived "from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b) (emphasis added). In the Cable Act, "cable service" is defined as

(A) the one-way transmission to subscribers of (i)

video programming, or (ii) other programming service, and

*5 (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6). It is reasonable to conclude that the addition of new, limiting language, which does not include telecommunications services, demonstrates Congressional intent to exclude telecommunications service from the purview of the franchise fees provisions. [FN23]

[FN23]. The Cable Act's legislative history supports the interpretation that Congress added the restrictive language "to provide cable services" to the fee provision to limit the scope of franchise fees. See H.R. CONF. REP. 104-458 (1996), Pub.L. No. 104-104, 1996 WL 46795. Specifically, the House Conference Report states that Congress adopted the amendment to clarify that the "franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system" and that fees should be imposed on "only the operators' cable-related revenues." *Id.* This legislative history makes clear that gross revenues derived from telecommunications service were intentionally made beyond the reach of franchise fees.

The Cable Act itself corroborates this conclusion by providing a separate definition of "telecommunications service" from the definition of "cable service." [FN24] See 47 U.S.C. § § 153(43) & (46). Further, the Cable Act expressly states that a cable operator or its affiliate which is engaged in the provision of telecommunications service does not require a franchise to do so, "and the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services." 47 U.S.C. 541(b)(3)(A). Moreover, recent case law under the Cable Act holds that cable service, telecommunications service, and information service are separate categories in the Cable Act, and regulation of any service depends on its categorization. See, e.g., *Bova v. Cox Communications*, 2002 U.S. Dist. LEXIS 12481, *3 (W.D.Va.2002); *GTE.Net LLC v. Cox Communications, Inc.*, 185 F.Supp.2d 1141, 1145 (S.D.Cal.2002). Further, the Federal Communications Commission ("FCC") recently issued a Declaratory Ruling, discussed in more detail below, in which it

affirmed its prior rulings that telecommunications service is separate and distinct from information service and cable service. *See In re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities; Notice of Proposed Rulemaking*, 17 FCCR 4798, 4820 ¶¶ 39-41, 2002 FCC LEXIS 4534 (Mar. 15, 2002). Thus, under principles of statutory construction, pre-FCC Ruling case law, and the FCC Ruling, it is reasonable to find that telecommunications service is a separate category of service under the Cable Act not subject to the franchise requirement or franchise fees that a municipality may impose on cable operators for cable service.

FN24. "Telecommunications service" is "the offering of telecommunications for a fee directly to the public," and "telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) & (46).

As to whether "cable service" encompasses "cable modem service," the FCC ruled in its March 2002 Declaratory Ruling that cable modem service is separate from cable service and telecommunications service. *See id.*, 17 FCCR 4798, 4818-4852, 2002 FCC LEXIS 4534. The courts that considered this issue before the FCC Ruling were split, and the United States Supreme Court has not decided the issue. *See Nat'l Cable and Telecomm. Ass'n, Inc. v. Gulf Power Co. et al.*, 534 U.S. 327, 337-39 (2002) (declining to decide whether cable modem service is cable service or telecommunications service); compare *MediaOne Group, Inc. v. Cty. of Henrico*, 97 F.Supp.2d 712, 715 (E.D.Va.2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir.2001) (holding that cable modem service is a cable service), with *AT & T v. City of Portland*, 216 F.3d 871, 877 (9th Cir.2000) (holding that cable modem service is a telecommunications service).

*6 These courts did not have the benefit of an interpretation of cable modem service by the FCC, which is the agency charged with interpreting the Cable Act and other federal communications legislation. The Supreme Court has confirmed that because the FCC is responsible for interpreting

federal communications legislation, its decisions on ambiguous provisions of federal communications legislation must be accepted if reasonable. *See Gulf Power*, 534 U.S. at 333, 337 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). Further, the Supreme Court has held that "the subject matter here is technical, complex, and dynamic; and, as a general rule, agencies have authority to fill gaps where statutes are silent." *Id.* at 339 (citing *Chevron*, 467 U.S. at 843-44). The **Parish** does not attack the FCC's Declaratory Ruling on the grounds that it is an unreasonable interpretation of the Cable Act. Rather, the **Parish** argues, without citing any authority, that the FCC's Ruling should not be given effect because it is pending review in the Ninth Circuit. The effect of the FCC's Ruling is not diminished by the existence of an appeal. The taking of an appeal does not stay or otherwise invalidate the FCC's ruling. *See 28 U.S.C. § 2349(b)* ("The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency...."). Thus, the existence of an appeal is not a reason to reject the FCC's Ruling.

After review of the FCC's Ruling, the Court adopts the FCC's interpretation of "cable modem service" as the proper interpretation of the statute. Although the FCC's interpretation of "cable modem service" may be politically controversial, there is nothing in the record or in the **Parish's** briefs to support a finding that this interpretation is unreasonable on its face or in effect. The FCC concluded that cable modem service is an "interstate information service," not a "cable service" or a "telecommunications service." *See Declaratory Ruling*, 17 FCCR 4798, 4818-4852, 2002 FCC LEXIS 4534. The FCC based its Ruling on a detailed analysis of the structure and language of the Cable Act, the nature of cable modem service, and relevant legislative history. The FCC relied on its earlier findings that cable service, through one-way transmission to subscribers of video programming or other programming service, "encompasses only video delivery systems." *See id.* at 4833 ¶ 60. Based on legislative history, the FCC viewed one-way transmission to subscribers as a "medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers." *Id.* at 4833 ¶ 61. Thus, the FCC found that cable services, consisting of "one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity and should not be regulated as such." *Id.* The FCC also relied on its earlier interpretation that the term "transmission" in the definition of cable services requires "active participation in the selection and distribution of video

programming," which is controlled by the cable operator, but found that "cable operators do not control the majority of information accessible by cable modem subscribers...." *Id.* at 4833 ¶ 62. The FCC also found that cable modem service does not provide video programming or other video programming service, as traditionally provided by cable service. *Id.* at 4833 ¶ 63. Finally, the FCC found that the legislative history shows that Congress did not intend for cable service to encompass the "capacity to engage in transactions or off- premises data processing, including unlimited keyword searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers' premises...." *Id.* at 4833 ¶ 64.

*7 On the other hand, the FCC had previously found that Internet access service is an information service because "the provider offers a single, integrated service, Internet access, to the subscriber" which combines "computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications." *Id.* at 4821 ¶ 36. Extending this analysis, the FCC viewed cable modem service as "an offering of Internet access service." *Id.* at 4821 ¶ 38. The FCC explained, "As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS.... [It is] a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities...." *Id.* Having reached these conclusions, the FCC ultimately ruled,

[] [C]able modem service is an interstate information service within the scope of our jurisdiction over interstate and foreign communications. We recognize, however, that it is provided over the facilities of cable systems that occupy public rights-of-way in local communities. In order to facilitate our national policy goals, we seek to clarify the authority of State and local governments with respect to cable modem service.... Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.

Id. at 4848 ¶ 96, 4851 ¶ 105.

These conclusions appear reasonable, and the **Parish** has failed to point out any error in the FCC's analysis. Rather, without addressing the impact of the FCC's ruling on its claims for franchise fees, plaintiff argues that in another amendment, Congress intended to expand, rather than narrow, the definition of "cable

service." In 1996, Congress added the words "or use" to the definition of cable service so that the definition reads, "... subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service." 47 U.S.C. § 522(6) (emphasis added). To support this contention, plaintiff points to a remark by Representative Dingell during the House debates, in which he said that the "conference agreement strengthens the ability of local governments to collect fees for the use of public right- of-way," and that "the definition of the term 'cable service' has been expanded to include game channels and other interactive services." See 142 CONG. REC. H. 1145, 1156 (daily ed. Feb. 1, 1996) (remarks of Rep. Dingell)). The FCC expressly considered and rejected the "use" argument plaintiff makes:

We disagree with those cable operator and franchising authority commenters who argue that this amendment brings cable modem service within the definition of cable service. The amendment itself addresses only the use of content otherwise qualifying as cable service.... The legislative history relied on by commenters who favor an expansive reading of the amendment does not require the result they advocate. The Joint Explanatory Statement for the 1996 Act states: "The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services." This statement supports an intent to permit interactivity associated with both video and other programming services provided by cable operators to subscribers. If Congress intended by the language in the Joint Explanatory Statement to broaden the meaning of cable services to include stand-alone "information services" as defined in the 1996 Act ... the language of the statute itself does not reflect this intent.

*8 Declaratory Ruling, 17 FCCR 4798, 4836 ¶ ¶ 65-66.

The **Parish** also attempts to argue that the Cable Act does not prohibit franchise fees on voice and data services in this case because issues of fact remain as to the specific amounts of gross revenue **Cox** derives from its various services and as to **Cox's** business arrangement by which it receives revenues for telecommunications service. This argument is without merit, because such amounts and arrangements are irrelevant to the Court's finding that the Cable Act, as a matter of law, prohibits the **Parish** from imposing franchise fees on **Cox's** telecommunications service and cable modem service

through the 1990 Franchise Agreement.

Finally, plaintiff argues that the FCC's ruling, if applied retroactively to its preexisting contract with defendant, would disturb plaintiff's "vested rights" and violate its due process rights by impairing plaintiff's contract. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 11-12.) Plaintiff's argument fails on its face because the 1990 Franchise Agreement expressly provides that "the provisions of this Agreement shall be construed to conform to all present and future requirements of the FCC, all acts of Congress of the United States, and all acts and requirements of the State of Louisiana." (Pl.'s Ex. A, attached to Pl.'s Pet. § 12.23.) In fact, under the Agreement, if a future modification to existing law *benefits* the **Parish**, the Agreement will be automatically amended to provide for full regulation by the **Parish**. (*See id.*) The **Parish** cannot escape its contractual obligation to abide by future modifications to existing law when the modifications are unfavorable. Further, even if plaintiff's argument for impairment of contract had merit, plaintiff would have to "overcome a presumption of constitutionality" and "establish that the legislature has acted in an arbitrary and irrational way." ' Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 472 (1985) (quoting Pension Benefit Gty. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984)). Plaintiff has not even briefed this issue.

III. Conclusion

For the foregoing reasons, the Court GRANTS defendant's partial motion to dismiss plaintiff's claims for franchise fees on defendant's telecommunications and cable modem services.

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